Editor's note: Appealed – aff'd, Civ. No. LV-1654 (D. Nev. May 4, 1972), aff'd, No. 72-2396 (9th Cir. Oct. 9, 1974), 505 F.2d 180, cert. denied, S.Ct. No. 74-1009 (April 21, 1975), 421 U.S. 930 (1975)

UNITED STATES
v.
CLEAR GRAVEL ENTERPRISES, INC.

IBLA 70-15 Decided May 20, 1971

Mining Claims: Discovery: Marketability – Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that the material on the claim is sufficient, both as to quantity and quality, as is the abundant supply of similar material in the area, is insufficient to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the marketability test for minerals of widespread occurrence it is not enough to show that there is a general demand for the type of material in question, but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Discovery: Marketability – Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date; where claimants fail to make that showing, the claim is properly declared null and void.

IBLA 70-15

Mining Claims: Generally -- Mining Claims: Determination of Validity -- Generally

Mining Claims: Discovery:

For a mining claim to be valid, the required discovery must be made within the limits of the claim as located; a discovery outside the limits of the claim cannot serve to validate it despite the proximity of the discovery to the claim.

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IBLA 70-15 :	Nevada Contest No. 057075	
	:	
UNITED STATES :		Placer mining claims
v.	:	held null and void
CLEAR GRAVEL ENTERPRISES, INC.	:	
	:	Affirmed

DECISION

Clear Gravel Enterprises, Inc., has appealed from a decision dated October 4, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner dated June 29, 1966, declaring Clear Gravel Nos. 12 and 13 placer mining claims (hereinafter referred as the Nos. 12 and 13 claims) invalid for the reason that the Nos. 1 and 2 charges of the three charges listed in a contest complaint dated April 7, 1964, were sustained by the evidence presented at the hearing. The pertinent charges were:

> 1. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.
>
> 2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not have been marketed at a profit prior to the Act of July 23, 1955.

The claims are in the Las Vegas Valley in Clark County, Nevada. They are contiguous and are approximately 7 air miles and approximately 10 road miles southwest of the center 1/ of the city of Las Vegas, Nevada.

1/ Defined as the intersection of Main and Fremont Streets (Tr. 10). This and similar references are to the pages of the transcript of the hearing held on August 17 and 19, 1965.

The No. 12 claim covers the NW 1/4 and the No. 13 claim covers the SW 1/4 sec. 16, T. 21 S., R. 60 E., M.D.M. Clark County, Nevada (Ex. G-9C 2/).

Both claims are covered entirely by a common variety type of sand and gravel (Tr. 31-32) as is the area surrounding the claims and the Las Vegas Valley generally (Tr. 10-11, 36-38).

The two claims in question were located for sand and gravel on January 21, 1946, as part of a location of 16 contiguous placer claims, of 160 acres each, called the Clear Gravel Nos. 1-16 claims.

Through mesne conveyances the last of which was dated September 25, 1953, the appellant acquired title to the 16 claims.

On October 2, 1953, there was issued Classification Order No. 95, published on October 8, 1953, 18 F.R. 6412, which classified the land covered by the Nos. 12 and 13 claims for small tract disposal.

Two of the 16 Clear Gravel claims were declared invalid through contest proceedings on the grounds that there was not a discovery of valuable minerals; five of the claims were declared null and void because of conflicts with prior oil and gas leases. 3/

The invalidation of the seven claims left the nine remaining Clear Gravel claims separated. The Nos. 12 and 13 claims were left contiguous to one another but not to the seven other claims. The seven other claims were left contiguous to one another and were located in an area approximately a 1/2 mile east and southeast of the Nos. 12 and 13 claims. These seven contiguous claims were

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2/ This and similar references are to exhibits submitted at the hearing, supra.

3/ The seven claims were disposed of in the following cases: Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (December 29, 1959), aff'd, Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957); Clear Gravel Enterprises, Inc., A-27287 (March 27, 1956); Clear Gravel Enterprises, Inc., Nev. 049497 (Nevada land office, December 15, 1960), appeal dismissed, Bureau of Land Management, March 20, 1961.

the Clear Gravel Nos. 1, 2, 3, 4, 5, 6, and 14 (hereinafter referred to as the No. 1 claim, the No. 2 claim, etc.). They were all located in T. 21 S., R. 60 E., as are the claims in question. The claims embrace the following lands:

No. 1: SW 1/4 sec. 22
No. 2: SE 1/4 sec. 22
No. 3: SW 1/4 sec. 23
No. 4: NW 1/4 sec. 23
No. 5: NE 1/4 sec. 22
No. 6: NW 1/4 sec. 22
No. 14: SE 1/4 sec. 15.

On November 4, 1957, Earl M. P. Lovejoy and Edgar A. Hollingsworth, two Government mining engineers, issued a report recommending that adverse proceedings be directed against claims Nos. 12 and 13 (Tr. 70-71; Ex. G-16 at p. 3).

On October 6, 1958, the appellant filed application for patent (Nevada 049497) to the nine viable Clear Gravel claims (being Nos. 1-6 and 12-14) plus a tenth claim (Clear Gravel No. 15).

On December 22, 1960, appellant filed an amended patent application which had the effect of withdrawing the Nos. 12, 13, and 15 claims from the application of October 6, 1958, thus leaving the application outstanding only as to the seven contiguous Clear Gravel claims (being Nos. 1-6 and 14).

On March 20, 1961, appellant filed a separate application for patent (Nevada 057075) to the Nos. 12 and 13 claims.

On February 15, 1962, Hollingsworth, the aforementioned government mining engineer, made a report recommending, inter alia, that patents be given to the appellant for the nine viable Clear Gravel claims (being Nos. 1-6 and 12-14), thus reversing his 1957 position as to the Nos. 12 and 13 claims (Ex. G-16).

On June 7, 1962, less than four months after the date of the second Hollingsworth report, the appellant received patent to the seven contiguous Clear Gravel claims (being Nos. 1-6 and 14).

On April 8, 1963, the appellant sold the seven patented claims to Rainbow Acres Inc., for $2,300,000 (Tr. 139-140, 166-167, 190-191; Ex. G-14).

On July 22, 1963, Robert T. Webb, a government geologist, and Lewis G. Chichester, Jr., a government valuation engineer, made a report recommending that a contest complaint be filed against the Nos. 12 and 13 claims (Ex. G-15).

On April 7, 1964, the complaint which is the subject of this action was issued against the Nos. 12 and 13 claims.

The appellant filed a timely answer to the complaint in which it generally denied the three charges listed in the complaint and asserted:

> That Clear Gravel Placer Mining Claims Nos. 12 and 13 do contain sand and gravel deposits in sufficient quantity and quality to constitute a valid discovery, and accordingly the aforesaid sand and gravel deposits on said claims constitute a valuable mineral; that the aforesaid Clear Gravel Placer Mining Claims Nos. 12 and 13 are being mined, and are being held in good faith by Contestee, and Contestee has expended large sums of money in developing the aforesaid sand and gravel deposits on the aforesaid claims.

On August 17 and 19, 1965, a hearing on the issues was held at Las Vegas, Nevada.

The facts of this case as revealed by the evidence presented by both sides are generally not disputed; the dispute is largely over the legal effect which is to result from those facts.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine . . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, supra note 3; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964).

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. § 611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, supra note 3; United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969).

There is no contention here that the Nos. 12 and 13 claims have an uncommon variety of sand and gravel, and the evidence shows that it is ordinary material (Tr. 10-11, 31-32, 36-38). We therefore turn to a consideration of the evidence bearing on the marketability of the sand and gravel on the Nos. 12 and 13 claims as of July 23, 1955.

The evidence presented at the hearing showed that the Las Vegas Valley or area is situated within roughly a radius of 15 miles from the center of Las Vegas (Tr. 10, 14; Ex. G-9A, G-9B, G-9C, G-9D).

The bulk of the material found on the lands in the Valley is the same as the sand and gravel found on the claims in question (Tr. 38). There is evidence that the sand and gravel on the claims in question may be over 750 feet deep (Tr. 157). The sand and gravel on a claim a 1/2 mile east of claim No. 12 appears to be at least 200 feet deep (Tr. 220). Because most of the Las Vegas area has a common sedimentary type geological origin, it would be expected that most of the land in the area would show similar depths of sand and gravel (Tr. 11). In short the Las Vegas area has an unlimited supply of sand and gravel. This is illustrated in the evidence by the operation of Wells Cargo, Inc., and the operation of the partnership of J. F. Young, Dugal Young and Ralph Smith d/b/a Young and Smith Construction Company (hereinafter referred to as Young and Smith).

Wells Cargo, Inc., is currently the largest volume producer of sand and gravel in the area and it has been for most of the past 14 years. Yet it obtained all of the materials it now needs or needed, in excess of 10,000,000 tons (or cubic yards), from the western side of the Valley for all these years from an area that currently covers less than 80 acres and which has never covered more than 160 acres and which is now only 40 feet deep at its deepest point (Tr. 219, 220-221, 223-224).

Young and Smith was the largest (Tr. 224) or second largest volume producer (Tr. 133-134) of sand and gravel in the Las Vegas area during the period approximately from 1952 to 1956, 4/ and during that time it had an exclusive lease on the 16 Clear Gravel sand and gravel claims (Tr. 196; Ex. C-H1, C-H2). The 16 claims comprised 2560 acres (Tr. 221-222), which as noted may have contained sand and gravel to a depth of 200 to 750 feet or more. Yet all of the sand and gravel Young and Smith needed during those years came out of a pit on the Clear Gravel No. 1 claim, which pit covered an area of only 3 or 4 acres and was generally less, but not more, than 6 feet deep (Tr. 196, 230).

No material was removed from the Nos. 12 and 13 claims until 1963 (Tr. 26-27, 40, 165, 198). The president of the appellant stated on direct examination that the appellant did not even begin to develop the Nos. 12 and 13 claims until approximately 1963 (Tr. 159-160).

As of February 27, 1961 (Ex. G-7) and December 3, 1962 (Tr. 96) the only workings found on the claims were some bulldozer cuts, backhoe trenches, and primitive jeep trails connecting the cuts and trenches (Tr. 22, 26-27, 96-98). On the No. 12 claim there were five bulldozer cuts which averaged 20 to 60 feet long by 10 feet wide by 2 to 5 feet deep, and 14 backhoe trenches that were 1-1/2 to 4 feet deep (Tr. 27; Ex. G-6, G-7). On the No. 13 claim there were five bulldozer cuts with

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4/ There is some confusion in the record as to what years Young and Smith operated. The Vice President of the appellant testified that Young and Smith operated during the years 1952-1956 (Tr. 134). A former Government mining engineer gave a report in 1962 that said Young and Smith operated from 1951 to 1954 (Ex. G-16 at p. 5). The leases to the land from which Young and Smith mined were dated April 30, 1953, and May 29, 1954 (Ex. C-H1, C-H2). This decision will assume arguendo that Young and Smith operated during any or all of these periods.

average dimensions of 10 to 80 feet long, 10 to 20 feet wide, and 2 to 3 feet deep, and 15 backhoe trenches 1 to 4 feet deep (Tr. 29; Ex. G-6, G-7). None of the material dug from these cuts or trenches was removed from the claims (Tr. 165, 198). The cuts, trenches, and jeep trails appear to have been the result of assessment or possibly exploratory work done by appellant and/or the original locators, and not the result of any effort to develop the claims (Tr. 129-131, 140-141, 145-146, Ex. C-B1 through C-B9, C-R). Between 1963 and 1964 some 35,000 yards of material were removed from the claims.

As of May 12, 1963, there was no haulage road that reached the area of claims Nos. 12 and 13 even though a road could easily have been constructed (Tr. 57).

In 1955 there were approximately 10 sand and gravel operators in the Las Vegas Valley (Tr. 60-61, 64-65). Three of these operated very close to the Nos. 12 and 13 claims. In 1951 Wells Cargo, Inc., started to operate a pit which is 1/2 mile east of claim No. 12 and is still operating it (Tr. 35, 50; Ex. G-7, G-8, G-9C). In 1953 W-M-K started to operate a pit about 2-1/2 miles southeast of the Nos. 12 and 13 claims and is still operating it (Tr. 35, 54). Young and Smith leased the 16 Clear Gravel claims from the appellant (Ex. C-H1, C-H2), and for the period from approximately 1952 until 1956 (see note 4 supra) Young and Smith operated a pit on the Clear Gravel No. 1 claim, which pit was approximately one mile southeast of the Nos. 12 and 13 claims (Tr. 60, 196; Ex. G-9C). Young and Smith operated the pit at a profit, but stopped operating it when, reportedly due to poor management, Young and Smith went out of business (Tr. 62, 118-119; Ex. G-16 at p. 5).

The Nos. 12 and 13 claims were, for practical purposes, about as proximate to the Las Vegas sand and gravel market in 1955 as were the Wells Cargo, Inc., and the Young and Smith operations. They were also as close, and in some cases closer, to that market than some of the other pits that were operating in the Valley at that time (Tr. 87-88, 186, 220).

The material on the Nos. 12 and 13 claims is essentially the same material that Wells Cargo, Inc., Young and Smith, and the other operators producing in 1955 mined from their pits (Tr. 41, 61-62, 63-64, 186-187, 215-216).

There was growth in the construction business in the Las Vegas Valley in the years immediately preceding and since July 23, 1955, but this rate of growth slowed down in 1955 and 1956, and gravel operators were not at full capacity in these years (Tr. 79; Ex. C-G1, C-G2). In any event the 1955 market for sand and gravel in the Valley was being adequately satisfied by the then existing producers (Tr. 45-46, 82-83).

Because of these facts, Robert T. Webb, a Government geologist, testified that based on his inspection of the claims on July 21, 1963, May 12, 1965, and August 16, 1965 (Tr. 10), and his knowledge of the sand and gravel market in the area, it was his opinion that the sand and gravel on the Nos. 12 and 13 claims could not be extracted, removed, and marketed at a profit as of July 23, 1955 (Tr. 44-46).

Lewis G. Chichester, Jr., a Government valuation engineer, examined the claims on December 3, 1962, and July 21, 1963 (Tr. 96); he testified that his opinion was the same as Webb's, basically because a 1955 market had not been demonstrated for the material on the claims (Tr. 99).

Regardless of whether there was a favorable showing as of July 23, 1955, as to such factors as the accessibility of the claims and their proximity to market, there was absolutely no showing of a present demand as of that date for the particular material located on these two claims. The total absence of such proof tended to confirm the adverse opinion of the two Government witnesses.

The lack of proof of sales from the claims as of July 23, 1955, although not completely decisive as to the issue of marketability, suggests that certain factors must have been involved that prevented the sale; i.e., it is indicative that the materials on the claims could not have been extracted, removed, and marketed at a profit as of that date. United States v. Everett Foster et al., 65 I.D. 1 (1958), aff'd, Foster v. Seaton, supra.

The lack of development on the claims as of July 23, 1955, particularly, the absence of a road to the claims 5/ (155), raises an inference that the market value of the minerals found on the claims was not then sufficient to justify the expenditures then required to extract and market them; i.e., it indicates that the materials on the claims were not marketable as of that date. United States v. Everett Foster et al., supra at 7-8.

Appellant presented evidence to show that as of July 23, 1955, there was a general demand in the Las Vegas area for sand and gravel of the type found on, and in the general area of, the Nos. 12 and 13 claims (Tr. 124-127, 216). This testimony was insufficient to show a discovery, because to satisfy the present marketability test, the claimant must show the existence of a demand for the material on the specific claim and not simply a general demand for the type of material in question. United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); United States v. Everett Foster et al., supra; United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965).

5/ Only a quarter of a mile road would have been needed (Tr. 155).

The appellant suggests by its evidence that since Young and Smith, Wells Cargo, Inc., and presumably W-M-K operated profitably before, during, and after 1955 out of pits in the same general area containing material of a similar quality and quantity to that on the Nos. 12 and 13 claims it follows that if the appellant or a lessee of the appellant, e.g., Young and Smith, had entered the business in 1955 on the Nos. 12 and 13 claims it would have done as well (Tr. 34, 50, 54, 60-64, 87-88, 118-119, 155, 217-220). In connection with this evidence and reasoning and allegedly because of it, the President, General Manager, and a recent Secretary-Treasurer of the appellant and also the Vice President of Wells Cargo, Inc., testified that it was their opinion that the material on the Nos. 12 and 13 claims could have been mined, removed, and marketed at a profit during and prior to 1955 (Tr. 144, 155, 172, 182, 186, 205, 212, 218). Similar to this evidence, reasoning, and opinions is the evidence, reasoning, and opinion found at pages 12 and 13 of the report dated February 15, 1962, of the Government mining engineer, Edgar A. Hollingsworth (Ex. G-16).

This is the same type of theoretical evidence which the United States District Court in Osborne v. Hammit, supra, found to be insufficient to satisfy the marketability test for sand and gravel claims in the Las Vegas area, and it must accordingly be rejected for the same reasons given there. That Court said:

> . . . If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary inasmuch as the government witness, William L. Shafer, although well qualified as a mining engineer, had few, if any qualifications in experience and knowledge to testify concerning the market for the material in the Las Vegas area, and the costs of extraction and processing. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably forseeable future.

The mining laws of the United States are quite benificent [sic]. A prospector may occupy public lands and mine and remove materials therefrom for his personal profit by his own ex parte action, without so much as a 'by-your-leave' from any person or public official.

If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would, perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisifed the requirements of Foster v. Seaton (supra) by providing bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

See the further discussion of Osborne v. Hammit in United States v. Loyd Ramstad and Edith Ramstad, supra, and United States v. Keith J. Humphries, A-30293 (April 16, 1965).

The contract between the appellant and Apex Ready Mix, Inc., dated March 21, 1963, for the claims in issue, and that between Las Vegas Sand and Gravel Co. Inc. and Engineered Concrete Corp., dated December 1, 1961, for the claims in issue, among other lands, both of which authorized the removal of sand and gravel, have little, if any, probative force to establish the existence of a market for sand and gravel from the claims in issue as of July 23, 1955 (Ex. C-O, C-P; Tr. 151-52, 153-154). The opinions of such marketability, voiced by the appellant's witnesses, are insufficient to rebut the prima facie case made by the Government.

Of course the Nos. 12 and 13 claims cannot be validated on the basis of any possible discovery existing in the patented Clear Gravel No. 1 claim or in any of the other patented Clear Gravel claims (being Nos. 2-6 and 14) or in any of the patented claims located near the Nos. 12 and 13 claims (Tr. 90-94; Ex. G-9B, G-9C), since for a mining claim to be valid, the required discovery must be made within the limits of the claim as located, 30 U.S.C. §§ 23, 35 (1964), and a discovery outside the limits of the claim cannot serve to validate a claim no matter what its proximity to the claim. Waskey v. Hammer, 223 U.S. 85 (1912).

Next appellant suggests by its evidence several reasons why the Nos. 12 and 13 claims were not developed or operated until 1963.

First, that appellant hesitated to develop or operate the claims because it was informed by Government personnel that if the conflicting small tract applications that existed from October 2, 1953, until approximately 1963-1964 (Tr. 147; Ex. G-3, C-I, C-M) for lands covered by the claims were approved and the applicants awarded patents, appellant might have to pay for whatever material it removed (Tr. 136, 147-148, 156, 160, 163-164, 188-190; Ex. C-I).

Second, that the existence of the small tract applications made it difficult for appellant to find an operator willing to lease and operate the claims (Tr. 180).

Third, that the Clark County Planning Board refused to give appellant permission to operate the claims until the small tract applications were cleared from the lands covered by the claims, and so permission was withheld by the Board until 1964 (Tr. 148; Ex. C-K).

Fourth, that appellant did not hink it was necessary to operate or develop the claims in order to obtain a patent to them (Tr. 148; Ex. C-K).

Even assuming these reasons for not developing or operating the claims are true, they do not prove that the material on the claims was marketable as of July 23, 1955. We cannot speculate that the appellant would have satisfied this requirement even if the asserted restraints had not existed. Furthermore the Government is not estopped by its action from bringing the complaint in question, since nothing it did whether in opening the claims to small tract applications (Ex. G-3) or in advising appellant regarding the possible results of the small tract applications could in any legal or physical way have prevented the appellant from developing or operating the claims at any time appellant chose to do so either prior to, as of, or after July 23, 1955.

The appellant has failed to show that by reason of present demand and bona fides in development, the deposits on the Nos. 12 and 13 claims were of such value that they could have been mined, removed, and disposed of at a profit as of July 23, 1955. 6/ Nevertheless, appellant argues on this appeal that the Nos. 12 and 13 claims should not be declared invalid for a number of reasons.

6/ Throughout this case we have referred to July 23, 1955, as the cut-off date as of which a discovery must be shown. Actually the critical date appears to be October 2, 1953, at the earliest or July 15, 1955, at the latest. On the latter date there was published a regulation which provides that a classification under the Small Tract Act, 43 U.S.C. § 682a et seq. (1964), would segregate the land classified from all appropriations, including locations under the mining laws (43 CFR 257.3(b), 20 F.R. 336; subsequently renumbered 43 CFR 2233.2(b); now 43 CFR 2731.2(b), 35 F.R. 9619 (1970). On the earlier date there was issued Classification Order No. 95, published on October 8, 1953, 18 F.R. 6412, which classified the land in appellant's claims for small tract disposal (Ex. G-3). In Osborne v. Hammit, supra, the court held that Order No. 95 was in effect a withdrawal of land which invalidated ab initio any mining claim located after the classification order, including one located prior to the adoption of the regulation. See also Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966). Under the Osborne ruling appellants would have to show that the material from their claims was marketable at a profit as of October 2, 1953. At the latest the showing would have to be made as of January 15, 1955, the date of publication of the regulation spelling out the effect

First, appellant argues that it is wrong to interpret the pertinent mining statute (30 U.S.C. § 22 (1964)) as requiring a demonstration of present value or marketability. It contends that its claims can be sustained on the basis of prospective market value (which it contends it has shown). This argument was heard and dismissed in Foster v. Seaton, supra, where, at page 838, it was said:

> Appellants' principal assignment of error is that the Secretary misinterpreted the statute by requiring a demonstration of present value. They ernestly contend that their claim can also be sustained on the basis of prospective market value.
>
> . . . .
>
> . . . The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

The marketability test has been approved by the Supreme Court in United States v. Coleman, supra. See also Palmer v. Dredge Corporation, supra note 3, which sustained Departmental decisions holding invalid 28 sand and gravel claims (two of which were the Clear Gravel Nos. 10 and 11) lying within 5 to 8 miles west of Las Vegas for a lack of showing of marketability at a profit as of July 23, 1955.

As authority for its contrary contention appellant cites the case of Freeman v. Summers, United States, Intervener (On Rehearing), 52 L.D. 201 (1927), and quotes from page 206 as follows:

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fn 6 (cont.)
of a small tract classification. (On October 6, 1961, Classification Order No. 95 was revoked insofar as it applied to the land covered by the Nos. 12 and 13 claims (Ex. G-4). Nevertheless the Order worked as a withdrawal for the period it was in effect and, of course, since July 23, 1955, common varieties of sand and gravel are no longer locatable minerals.) We do not, however, rest our decision on appellant's failure to make the required showing as of either October 2, 1953, or January 15, 1955, since it is clear that they failed to make the showing even as of July 23, 1955.

> It is not necessary in order to constitute a valid discovery under the General Mining Laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit. (Emphasis added by appellant.)

The Freeman case is not controlling in appellant's situation. It did not involve sand and gravel. The Department's application of the present marketability test to sand and gravel has received ample support.

Next appellant cites Solicitor's Opinion, 69 I.D. 145, 146 (1962), which reads as follows:

> When a non-metallic mineral is not of extremely wide occurence and when a general demand for that mineral exists, it may be enough instead of showing an actual existing market for the products of that particular mine to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

Appellant argues that the opinion and the quote contradict the requirement of showing a demand for the sand and gravel on the specific claim and not simply a general demand for the type of material in question.

Neither the opinion nor the quote contradict that requirement. It is clear that the Solicitor was not referring to sand and gravel claims when he used the words quoted, for on the same page he said:

> The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Next appellant cites Adams v. United States, 318 F.2d 861 (9th Cir. 1963), and says the Adams case supports its position in this case.

The Adams case, in which the court upheld the Department's determination that several gold mining claims were invalid, again, was concerned with gold, not sand and gravel. The court stated that while proved ability to mine at a profit need not be shown, the claimant must demonstrate that he had met the prudent man test and that economic factors could be considered in applying this test. As we have seen the marketability test is but a refinement of the prudent man test, and has particular pertinency in evaluating claims based on mineral deposits of widespread occurrence.

Next appellant argues, contrary to what has already been said in this case, that it is not necessary in order to validate a sand and gravel claim to show that the material was marketable as of July 23, 1955, but it is sufficient to merely show that marketability exists as of some later date, for example, the date of the hearing. As authority for this proposition appellant cites Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

The Mulkern case held that the prudent man test must be met as of the time of the hearing for a claim to be valid, but it did not purport to say that if the claim is for a common variety of sand and gravel, located prior to July 23, 1955, that marketability as of July 23, 1955, need not also be shown.

In support of the same contention appellant also cites the case of Denison v. Udall, 248 F. Supp. 942 (D. Ariz. 1965). 7/

Denison, in pertinent part, simply stands for the propositions that a determination of the Department that there was no reasonable prospect of a future market for the manganese was not supported by substantial evidence and that the Government had not made a prima facie case. The case was remanded to the Department for further proceedings.

In the case at bar, the record amply establishes that sand and gravel deposits covered the area and that the market was being satisfied. In the light of these showings, it was incumbent upon the appellant to demonstrate by a preponderance of evidence the existence of a market as of July 23, 1955, for sand and gravel from its claims. The appellant has not sustained the burden of proof on this issue.

7/ For further proceedings see United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969).

Finally appellant's evidence suggests the following argument. Appellant says that there is no requirement that to validate a mining claim a claimant must prove certainty of profit or certainty of future sales or actual sales. We agree. United States v. Harold Ladd Pierce, supra at 283, and cases cited. Then appellant says that to require a showing of present marketability, as opposed to prospective marketability, is to require a showing of certainty of profit or certainty of future sales or actual sales and is, therefore, wrong. Accordingly, appellant says it must be considered sufficient to validate a claim merely to show prospective marketability.

The short answer to this argument is that the second premise is wrong. To require a showing of present marketability is merely to require a showing that profitable sales could presently be made, in a practical sense, from the claims and is not to require certainty of sales or profit or actual sales. United States v. J. R. Osborne et al., 77 I.D. 83, 94 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision is affirmed. 8/

Martin Ritvo, Member

We concur:

Frederick Fishman, Member

Francis E. Mayhue, Member.

8/ For other cases in which sand and gravel claims near Las Vegas were held invalid see United States v. J. R. Osborne et al., supra; United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970); United States v. Neil Stewart et al., 1 IBLA 161 (1970); United States v. William A. McCall, Sr., et al., 2 IBLA 64 (1971).